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Supreme Court, U.S.
FILED
001349 FEB 23 2001
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

JERRY LAYNE ROGERS, SR.,
Petitioner,

v.

MICHAEL W. MOORE,
Secretary, Florida Department of Corrections, State of Florida,

BRADLEY D. CARTER,
Warden, Union Correctional Institution, Raiford, Florida,
Respondents.

On Petition For Writ Of Certiorari To The
United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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February 23, 2001

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit erred as a matter of law in denying Petitioner's habeas corpus petition alleging ineffective assistance of appellate counsel when it failed to assess counsel's performance under the legal standards in effect at the time of Petitioner's direct appeal.

2. Whether the Eleventh Circuit erred as a matter of law in denying Petitioners' claim of ineffective assistance of appellate counsel where counsel failed to raise an obvious claim of reversible error on direct appeal.

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE

The caption to this case contains the names of all parties to this proceeding, both here and before the United States Court of Appeals for the Eleventh Circuit. No corporations or parent corporations are involved in this matter.

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OPINIONS BELOW

The mandate of the court of appeals (App. A1-A2) and the decisions of the court of appeals denying Petitioner's appeal (App. A5-A14) and motion for rehearing (App. A3-A4) are unreported. The decision of the district court denying Petitioner's petition for writ of habeas corpus (App. A23-A29) is unreported.

JURISDICTION

The decision of the court of appeals was entered on October 12, 2000. A timely motion for reconsideration was denied on November 27, 2000. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES & RULES INVOLVED

The Sixth Amendment of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to

> have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment of the United States Constitution provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28 U.S.C. § 2254(d) provides in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as

> determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Florida Rule of Criminal Procedure 3.111(d)(5) provides:

> If a waiver [of counsel] is accepted at any stage of the proceedings, the offer of assistance of counsel shall be renewed by the court at each subsequent stage of the proceedings at which the defendant appears without counsel.

STATEMENT OF THE CASE

This case has important implications for the lower federal courts' application of a defendant's Sixth Amendment right to the effective assistance of counsel on direct appeal, as established by this Court's decisions in *Strickland v. Washington*, 466 U.S. 668 (1984), and *Evitts v. Lucey*, 469 U.S. 387 (1985). Contrary to this Court's directive in *Strickland* that courts must assess counsel's effectiveness by the legal standards in effect at the time of counsel's conduct, the court of appeals in this case analyzed the constitutionality of counsel's performance on direct appeal solely by reference to two state court cases decided many years after the direct appeal. In so doing, the court of appeals disregarded the clear requirement that the constitutionality of counsel's performance must be judged under the law in effect as of the time of counsel's actions. That result unfairly and unconstitutionally restricts a defendant's Sixth Amendment right to the effective assistance of counsel and is directly contrary to this Court's holding in *Strickland*. Accordingly, review by this Court is warranted.

I. FACTS AT TRIAL

On April 12, 1982, Rogers was arrested and charged with two counts of armed robbery in connection with the robbery of a Publix store in Orange County, Florida.[1] He was ultimately tried and convicted on both counts, and was sentenced to two twenty-year terms.

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[1] Because money was taken from two people during a single incident at the Publix store, Rogers was charged with two separate armed robberies.

These convictions were later used as substantive evidence of guilt in a murder prosecution that resulted in Rogers's being sentenced to death. *See Rogers v. State*, 511 So. 2d 526 (Fla. 1987), *reversed*, Case No. 91,044 (Fla. Feb. 15, 2001).[2]

In pretrial proceedings in the fall of 1982 and the spring of 1983, Rogers was declared indigent and was provided with court-appointed counsel. On August 22, 1983 -- the day before trial -- Rogers informed the trial court that he wanted to represent himself. Rogers explained that he was dissatisfied with his appointed lawyer, in particular because the lawyer had failed to confer with a single witness even though trial was scheduled to begin the next day.

The trial court then conducted an abbreviated colloquy with Rogers, Charles Tabscott (Rogers's appointed lawyer), and the prosecutor. The court granted Tabscott's motion to withdraw and permitted Rogers to proceed *pro se*. However, the court asked Tabscott "to remain available in an advisory capacity." Three days into the trial, on August 25, 1983, the court granted a mistrial. A new trial was scheduled

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[2] The key witness against Rogers in the Publix trial was a disgruntled former employee and convicted felon on probation, Thomas McDermid, who had implicated Rogers in a series of robberies, and later a murder, in exchange for a highly favorable plea bargain that included immunity from prosecution for that murder. The Florida Supreme Court recently reversed Rogers's 1984 murder conviction based on evidence withheld from the defense that, among other things, would have directly impeached McDermid's credibility. *Rogers v. State*, Case No. 91,044 (Fla. Feb. 15, 2001).

to begin on September 26, 1983. On that morning, the trial court reversed its prior evidentiary ruling and held that the State would be permitted to introduce evidence of two other armed robberies as proof of Rogers's guilt on the Publix robberies. It based its ruling on Florida's so-called *"Williams* Rule," which in certain circumstances permits the use of prior criminal acts as substantive evidence of guilt. *See Williams v. State*, 110 So. 2d 654 (Fla. 1959).

In response to the trial court's reversal of this key evidentiary ruling, Rogers requested and was granted a one-month continuance. Although the trial court noted that "the defense posture ha[d] changed" as a result of its evidentiary ruling, it did not renew the offer of counsel. Rogers was never told that he could revoke his prior waiver of counsel now that his defense had become vastly more difficult.

The second Publix trial began on October 31, 1983. Rogers again represented himself. The trial court never renewed the offer of counsel at any time either before or during the second trial. In fact, the trial court never told Rogers that, despite his waiver of counsel, he could later change his mind and choose to be represented by counsel. To the contrary, midway through the second trial, in response to concerns that Rogers expressed about the difficulties of securing discovery and other records, the trial court made the following remarks:

> You're representing yourself and you made that decision to represent yourself, and then you say, "Well, golly, gee, I have so much difficulty

> getting all this done." Well, so what. You take your choice, I guess. . . . I mean, Mr. Rogers has undertaken to represent himself. And he goes by the same rules.

As reflected in the August 1983 hearing when Rogers was permitted to proceed *pro se*, the trial court instructed Rogers's court-appointed lawyer, Charles Tabscott, "to remain available in an advisory capacity" though he "would not be responsible for the conduct of trial." Tabscott served in that restricted role in both the first and second Publix trials. Rogers conducted voir dire and the direct and cross-examination of every witness in both trials. He presented opening statements in both trials, and closing argument in the second (there was none in the first). He conducted the direct and cross-examination of every witness at both trials. After conviction in the second trial, he argued his case at sentencing. In short, as instructed, Tabscott served only in an "advisory capacity" while Rogers conducted the defense.

II. FACTS OF THE DIRECT APPEAL

Counsel from the public defender's office was appointed to represent Rogers on direct appeal. Rogers's appellate lawyer raised a total of seven claims on direct appeal, in a brief that was 24 pages long (with just 18 pages of argument). No reply brief was filed.

Of the seven claims raised on direct appeal, one raised a challenge to Rogers's sentence that, even if successful, would not have affected his conviction. The remaining six claims challenged evidentiary and other

discretionary rulings that were subject to reversal only under the exacting standard of abuse of discretion.[3] Appellate counsel's primary argument, that the trial court committed an abuse of discretion in admitting other-crimes evidence under the *Williams* Rule, failed even to discuss the main case on which the trial court had relied in admitting evidence of other crimes.[4]

Despite raising seven claims, the appeal brief omitted any claim under Fla. R. Crim. P. 3.111 -- the rule of Florida procedure requiring that "the offer of assistance of counsel shall be renewed by the court at each subsequent stage of the proceedings at which the defendant appears without counsel." (Emphasis added.) Indeed, the fact that Rogers proceeded *pro se* was barely mentioned in the brief.

On January 4, 1985, the Florida Fifth District Court of Appeal affirmed Rogers's convictions and sentences without written opinion.

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[3] The six discretionary issues raised by appellate counsel were based on the trial court's: (1) admission of evidence of other crimes under the *Williams* Rule; (2) denial of a motion to appoint an expert witness; (3) denial of a continuance; (4) failure to replace a juror; (5) restriction of the cross-examination of a witness; and (6) denial of a motion for mistrial in the midst of trial.

[4] The case was *Chandler v. State*, 442 So. 2d 171 (Fla. 1983). It was the central basis for the trial court's *Williams* Rule order. Remarkably, *Chandler* was not cited in Rogers's appeal brief.

III. THE STATE POST-CONVICTION PROCEEDING

On November 6, 1995, Rogers filed an original petition for writ of habeas corpus in the Florida Fifth District Court of Appeal. There Rogers raised the claim presented here, that he was denied his right to the effective assistance of appellate counsel because his appointed counsel on direct appeal failed to raise an obvious claim of reversible error under Florida law -- the trial court's failure to renew the offer of counsel at any subsequent stage of the proceedings, as required under Fla. R. Crim. P. 3.111.[5]

On December 21, 1995, the State moved to dismiss the original habeas petition on the grounds that it was untimely and procedurally barred. In the alternative, the State moved for supplementation of the record to include what it claimed were additional hearings potentially related to Rogers's decision to represent himself at trial. On February 2, 1996, the Fifth District Court of Appeal denied the State's motion to dismiss on grounds of procedural bar, but granted the State's alternative motion to supplement the record. (App. A38-A39.) By further order dated March 29, 1996, the Court of Appeal granted the State's motion to relinquish jurisdiction to the trial court to permit reconstruction of hearings that it claimed had not been transcribed. (App. A36-A37.)

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[5] Rogers also argued that his appellate counsel was constitutionally ineffective for failing to raise a challenge to his waiver of counsel under *Faretta v. California*, 422 U.S. 806 (1975). That claim is not at issue here.

Following proceedings to supplement the appellate record, the Fifth District Court of Appeal reasserted jurisdiction and the State responded to the substance of the original habeas corpus petition. On August 28, 1996, Fifth District the Court of Appeal denied Rogers's petition without written opinion. (App. A31-A32.) Because the Court of Appeal previously had denied the State's motion to dismiss the petition on grounds of procedural bar, the order denying the petition was necessarily a determination on the merits.

IV. THE FEDERAL HABEAS CORPUS PROCEEDING

On August 24, 1997, Rogers initiated this action by filing a petition for writ of federal habeas corpus in the United States District Court for the Middle District of Florida. Without conducting oral argument or an evidentiary hearing, the district court denied the petition by order dated February 23, 1998. (App. A23-A30.)

Rogers noticed a timely appeal from the district court's denial of the federal habeas corpus petition on March 22, 1999. By Order dated December 1, 1999 (App. A17-A18), as amended December 13, 1999 (App. A15-A16), the court of appeals issued a certificate of appealability on the following two issues:

> Whether appellate counsel was constitutionally ineffective for failing to argue on direct appeal that the trial court did not adequately warn appellant of the dangers

> and disadvantages of representing himself at trial.
>
> Whether appellate counsel was constitutionally ineffective for failing to argue on direct appeal that the trial court did not renew an offer of counsel to appellant at any time after appellant waived his right to counsel.

Following briefing and oral argument on those certified questions, the court of appeals affirmed the district court's denial of the federal habeas corpus petition. (App. A5-A14.) The court of appeals did not dispute that the failure of appellate counsel to raise a claim of reversible error on direct appeal deprives a defendant of his right to the effective assistance of counsel. Likewise, the court of appeals acknowledged that Fla. R. Crim. P. 3.111(d) "requires a trial court to advise a *pro se* defendant at each subsequent stage of the proceedings that he can invoke his right to counsel," but held that "Rogers cannot prevail on this claim because there is no *per se* rule in Florida that a trial court's failure to inform a defendant of his right to counsel at each subsequent stage of the proceedings, as required by Fla. R. Crim. P. 3.111(d) constitutes reversible error." (App. A13.)

In support of its conclusion, the court of appeals did not cite to a single case decided as of the time of Rogers's direct appeal -- May 1984. Instead, the court relied on two Florida cases decided after 1995 -- more than ten years after the time of Rogers's direct appeal -- in support of its conclusion that Fla. R. Crim. P. 3.111(d)

does not create a *per se* requirement of reversal upon the failure to renew an offer of counsel. In so doing, the court of appeals ignored the fact that all of the numerous cases decided by the time of Rogers's direct appeal universally required reversal upon the trial court's failure to renew the offer of counsel at any subsequent stage of the proceedings. Instead, the court of appeals assessed counsel's performance under case law that was not decided until more than a decade after counsel acted.

Rogers filed a timely petition for rehearing on October 30, 2000. The court of appeals denied the petition for rehearing without explanation. (App. A3-A4.)

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS AN ISSUE OF EXCEPTIONAL IMPORTANCE.

The issue presented here is whether the constitutionality of counsel's performance must be assessed under the case law in effect as of the time of those actions. In *Strickland*, this Court made explicit that counsel's performance must be assessed under then-governing standards and cannot be judged with the distorting effects of hindsight. Yet here, the court of appeals based its analysis on hindsight -- it relied solely on case law decided a decade after the appeal to excuse appellate counsel's failure to raise an obvious claim of reversible error. The decision of the court of appeals denying habeas corpus relief on a claim of ineffective assistance of appellate counsel, without any reference to case law in effect as of the time of the direct appeal, cannot be reconciled with this Court's precedent, and

distorts the Sixth Amendment right to the effective assistance of counsel on direct appeal.

The court of appeals thus has "decided an important federal question in a way that conflicts with relevant decisions of this Court." S. Ct. R. 10(c).

II. THE ELEVENTH CIRCUIT'S DECISION IGNORES THE LEGAL STANDARDS IN EFFECT AS OF THE TIME OF ROGERS'S DIRECT APPEAL AND CONTRAVENES THIS COURT'S PRECEDENT.

A. Courts Are Required to Assess Counsel's Performance by the Standards in Effect as of the Time of the Challenged Conduct.

In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court held that courts are to assess counsel's performance by the legal standards in effect at the time of counsel's actions. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689 (emphasis added). "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct . . . viewed as of the time of counsel's conduct. *Id.* at 690 (emphasis added). *Accord Roe v. Flores-Ortega*, 120 S. Ct. 1029, 1034-35 (2000) (quoting *Strickland*); *Pelmer v. White*, 877 F.2d 1518, 1522 (11th Cir. 1989) (refusing to judge trial counsel's performance by legal standards that were adopted during the pendency of the defendant's direct appeal, and holding that claims of ineffective assistance must be gauged according to the legal standards in effect at the time of counsel's performance).

B. Florida Law in Effect as of the Time of Rogers's Direct Appeal Universally Required Reversal Based on a Trial Court's Failure to Renew the Offer of Counsel.

It has long been established as a matter of Florida law that a trial court must renew an offer of counsel to a *pro se* defendant at each critical stage of the proceedings after the defendant first waives the right to counsel. This requirement is codified in Fla. R. Crim. P. 3.111(d)(4): "If a waiver [of counsel] is accepted at any stage of the proceedings, the offer of assistance of counsel shall be renewed by the court at each subsequent stage of the proceedings at which the defendant appears without counsel" (emphases added).[6] Florida law "clearly mandates that the trial court renew its offer to appoint counsel." *Billions v. State*, 399 So. 2d 1086, 1086-87 (Fla. Dist. Ct. App. 1981).

Thus, as the Florida Supreme Court held in *Traylor v. State*, 596 So. 2d 957, 968 (Fla. 1992), "the defendant is entitled to decide at each crucial stage of the proceedings whether he or she requires the assistance of counsel" (emphasis added). "At the commencement of each such stage, an unrepresented defendant must be informed of the right to counsel and the consequences of waiver." *Id.* "Where the right to counsel has been

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[6] The word "shall" makes this a mandatory requirement under Florida law. *See, e.g., Allied Fidelity Ins. Co. v. State*, 415 So. 2d 109, 111 (Fla. Dist. Ct. App. 1982) (where "'shall' refers to some required action . . . it is held to be mandatory") (citing *S. R. v. State*, 346 So. 2d 1018 (Fla. 1977)).

properly waived, the State may proceed with the stage in issue; but the waiver applies only to the present stage and must be renewed at each subsequent crucial stage where the defendant is unrepresented." *Id.* (emphasis added).

The rule has a clear purpose: to ensure that the *pro se* defendant does not operate under the misapprehension that he has irrevocably waived his right to counsel once he makes an initial decision to represent himself. *Sampson*, 466 So. 2d at 1181-82. Otherwise, a *pro se* defendant may well stumble from one error to the next, thinking that he is forever bound by his initial decision in a pretrial hearing. This is far more than a technical distinction. It certainly would not be intuitive to a criminal defendant to believe that he could waive his right to counsel but then later decide to "unwaive" that right.

Both voir dire and trial are separate critical stages of the proceedings at which the trial court must renew the offer of counsel. *See Jones v. State*, 650 So. 2d 1095, 1096 (Fla. Dist. Ct. App. 1995) (voir dire); *Sampson*, 466 So. 2d at 1182 (evidentiary phase of trial). Sentencing is another distinct phase at which the offer of counsel must be renewed. *See Tucker v. State*, 440 So. 2d 60, 62 (Fla. Dist. Ct. App. 1983).

A violation of the requirement to renew the offer of counsel can never be harmless error and requires reversal under Florida law. An "appellate court faced with a record of non-compliance [with Rule 3.111(d)] has no alternative but to reverse and remand for a new trial

. . . no matter how overwhelming the evidence of guilt may be." *Jones*, 650 So. 2d at 1096.[7]

Here, Rogers's appointed lawyer filed her brief on direct appeal on May 1, 1984. As of that time, in at least nine reported decisions -- all of which were entered months and even years before Rogers's appointed counsel filed her brief on direct appeal -- the Florida District Courts of Appeal had held, without exception, that reversal was compelled by Fla. R. Crim. P. 3.111(d)(5) when a trial court failed to renew the offer of counsel at any subsequent stage of the proceedings:

In *Billions*, 399 So. 2d at 1087, the trial court failed to renew the offer of counsel at sentencing. The district court of appeal held that Fla. R. Crim. P. 3.111(d)(5) "clearly mandates that the trial court renew its offer to appoint counsel at the sentencing stage of the trial," and was "compelled to vacate the sentences imposed and remand this cause to the trial court for resentencing, prior to which an offer of assistance of counsel shall be made by the trial judge."

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[7] The involvement of standby counsel (or, as here, a lawyer who provides "assistance" but is not responsible for the defense) does not alter the trial court's obligation to renew the offer of counsel. Even if standby counsel is involved, the defendant is appearing without counsel -- and Florida law specifically requires that the offer of assistance shall be renewed whenever a defendant proceeds without counsel. Thus, Florida courts specifically have held that the trial court must "give the same warnings to [a] defendant who has standby counsel as to one who does not." *Payne v. State*, 642 So. 2d 111, 111-12 (Fla. Dist. Ct. App. 1994); *accord Taylor v. State*, 610 So. 2d 576, 577 (Fla. Dist. Ct. App. 1992).

In *Baranko v. State*, 406 So. 2d 1271, 1272 (Fla. Dist. Ct. App. 1981) (per curiam), the trial court neglected to renew the offer of counsel at sentencing. The district court of appeal held that "it was error to fail to renew the offer of assistance of counsel at the sentencing hearing," vacated the sentence and remanded for resentencing.

In *Sayers v. State*, 423 So. 2d 985, 986 (Fla. Dist. Ct. App. 1982) (per curiam), the court was compelled to vacate the defendant's sentences and "reman[d] to the trial court for resentencing" because the offer of counsel had not been renewed.

In *Clark v. State*, 442 So. 2d 1044, 1044 (Fla. Dist. Ct. App. 1983), the district court of appeal reversed a conviction and sentence and remanded for a new trial after the trial court failed to renew the offer of counsel after the defendant's initial waiver.

In *Tucker*, 440 So. 2d at 62, the defendant argued that the trial court failed to renew the offer of counsel at sentencing. The district court of appeal agreed, and "reversed and remanded for a new trial."

In *Felton v. State*, 438 So. 2d 1049, 1049 (Fla. Dist. Ct. App. 1983), the trial court offered counsel at arraignment and later at sentencing, but neglected to renew the offer at the start of trial. The district court of appeal reversed and ordered a new trial, based on "the trial court's failure to make proper inquiry at the time of trial."

In *James v. State*, 428 So. 2d 706, 707 (Fla. Dist. Ct. App. 1983), "the trial court failed to inquire at sentencing whether appellant desired counsel at that point. A trial court has a duty to inform a defendant of

his right to counsel at each critical stage of the criminal proceeding, Fla. R. Crim. P. 3.111(d)(5), which includes the sentencing stage, and it was error to fail to renew the offer of assistance of counsel at the sentencing hearing." The district court of appeal remanded for resentencing.

In *Gurchick v. State*, 439 So. 2d 1002, 1003 (Fla. Dist. Ct. App. 1983), the court vacated the defendant's sentence "because the trial court failed to advise appellant of his right to counsel at this critical stage of the criminal proceeding."

A district court of appeal held that the trial court was "required to renew the offer of counsel for the sentencing phase of the proceedings," vacated the sentence and remanded for resentencing in *Sanderson v. State*, 447 So. 2d 374, 377 (Fla. Dist. Ct. App. 1984), *approved in part, quashed in part*, 469 So. 2d 1383 (Fla. 1985) (affirming portion of decision vacating sentence for failure to renew offer for counsel, and quashing portion of decision that revoked petitioner's probation).

In fact, after a diligent search of reported cases, undersigned counsel have not located a single reported case decided by the time of Rogers's direct appeal in which a Florida court did not find reversible error where the trial court failed to renew the offer of counsel to a *pro se* defendant.[8]

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[8] Florida cases decided after the time of Rogers's direct appeal continued to require reversal when a trial court failed to renew the offer of counsel. *See, e.g., Sproule v. State*, 719 So. 2d 349, 351 (Fla. Dist. Ct. App. 1998); *Jones v. State*, 650 So. 2d 1095, 1096 (Fla. Dist. Ct. App. 1995); *Cooper v. State*, 576 So. 2d 1379, 1380 (Fla. Dist. Ct. App. 1991); *Hayes* (continued...)

Because the court of appeals was bound to determine the effectiveness of Rogers's appointed counsel "as of the time of counsel's conduct," *Strickland*, 466 U.S. at 690 (emphasis added), the court erred in relying on post-1995 case law to gauge counsel's performance on direct appeal in 1984. Florida law at the time of Rogers's direct appeal clearly established that a failure to renew the offer of counsel was *per se* reversible error. Because absolutely no case law in effect in 1984 even suggested that this claim would not require reversal on direct appeal under the settled legal standards of that time, competent counsel would have raised this claim, and Rogers's conviction would have been reversed under settled Florida law.[9] The failure to raise this obvious

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v State, 566 So 2d 340, 342 (Fla. Dist. Ct. App. 1990); *Parker v. State*, 539 So. 2d 1168, 1169 (Fla. Dist. Ct. App. 1989); *Morgan v. State*, 504 So 2d 504, 505(Fla. Dist. Ct. App. 1987); *Brown v. State*, 479 So. 2d 152, 153 (Fla. Dist. Ct. App. 1985); *Sampson v. State*, 466 So. 2d 1181, 1182 (Fla. Dist. Ct. App. 1985); *Brown v. State*, 479 So. 2d 152, 153 (Fla. Dist. Ct. App. 1985).

[9] Even if the court of appeals were correct in looking to post-1984 cases to judge appellate counsel's effectiveness, the court of appeals misread the recent Florida cases to which it cited in its decision. In *State v. Roberts*, 677 So. 2d 264 (Fla. 1996), the court stated that "under normal circumstances, rule 3.111(d)(5) requires a trial court to advise a *pro se* defendant of the right to counsel at each subsequent stage of trial." *Id.* at 265. However, the court noted that application of the rule to the facts of that case would lead to an "absurd result," and would have permitted the defendant to "abuse the dignity of the court or to frustrate orderly proceedings," *id.* at 266, because the defendant had displayed a pattern of disrupting the trial. Subsequent Florida courts have specifically limited the

(continued...)

claim of reversible error therefore deprived Rogers of his right to the effective assistance of counsel on direct appeal.[10]

Roberts holding to situations in which the defendant's actions reflect an intent to "abuse the dignity of the court." *See Norman v. State*, 699 So. 2d 854, 854 (Fla. Dist. Ct. App. 1997); *see also Beard v. State*, 751 So. 2d 61, 62 (Fla. Dist. Ct. App. 1999). Here, the State has conceded that Rogers did not disrupt the proceedings; nothing in the record suggests that this narrow exception applies.

The court of appeals also cited *Mincey v. State*, 684 So. 2d 236 (Fla. Dist. Ct. App. 1996), which held that the offer of counsel need not be renewed to a *pro se* defendant where the defendant is represented by standby counsel who actively participates in the defense. In *Mincey*, standby counsel "participated in a number of pretrial hearings, including examining witnesses," "participated in voir dire, and in the exercise of jury challenges," "made all of the legal arguments during trial, including those in support of the motions for a judgment of acquittal," "filed a motion for a new trial," "argued the motion for a new trial, and handled the sentencing." *Mincey*, 684 So. 2d at 238 (emphasis added). *See also Harrell v. State*, 486 So. 2d 7, 7 (Fla. Dist. Ct. App. 1986) (per curiam) ("standby counsel participated in the defense at trial").

In this case, on the other hand, standby counsel was appointed in an "advisory" capacity only, and served no role in Rogers's trial. Rogers conducted the entire defense.

[10] Numerous decisions establish that counsel's failure to raise a claim of reversible error on direct appeal deprives a defendant of his constitutional right to the effective assistance of counsel. *See, e.g., Mapes v. Coyle*, 171 F.3d 408, 427-29 (6th Cir.), *cert. denied*, — U.S. —, 120 S. Ct. 369 (1999); *Jackson v. Leonardo*, 162 F.3d 81, 85 (2d Cir. 1998); *Clemmons* (continued...)

C. The Trial Court Never Renewed the Offer of Counsel to Rogers.

In this case, the trial court never renewed the offer of counsel to Rogers after he initially waived his right to counsel. Rogers was permitted to proceed *pro se* on August 22, 1983, the first day of trial, and a mistrial was granted several days later. The second trial did not begin until several months later, on October 31, 1983. Yet the offer of counsel was not renewed – at voir dire before the second trial, at any time before the evidentiary phase of the second trial, or before the sentencing phase of the second trial.

The failure to renew the offer of counsel is particularly egregious in this case, given the trial court's reversal in September 1983 of its critical evidentiary ruling governing the admission of other-crimes evidence to prove Rogers's guilt. (Page 6, *supra*.) When Rogers waived his right to counsel in August 1983, he confronted a relatively simple set of facts involving a single armed robbery. Yet when the trial court reversed itself a month later, and permitted the prosecution to introduce other-crimes evidence as substantive proof of guilt, the defense became enormously more complex. The trial court itself recognized that the "defense posture [had] changed" as a result of its reversal on this key evidentiary ruling. (Page 6, *supra*.) Whatever calculus had applied when Rogers

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v. Delo, 124 F.3d 944, 954 (8th Cir. 1997); *United States v. Cook*, 45 F.3d 388, 395 (10th Cir. 1995); *Freeman v. Lane*, 962 F.2d 1252, 1257-58 (7th Cir. 1992); *Orazio v. Dugger*, 876 F.2d 1508, 1510 (11th Cir. 1989); *Matire v. Wainwright*, 811 F.2d 1430, 1438-39 (11th Cir. 1987).

waived his right to counsel in August 1983 was now fundamentally altered -- but the offer of counsel was never renewed.

Rogers was in fact never told that he was not forever bound by his initial decision to proceed *pro se*. To the contrary, in one exchange halfway through the second trial, the trial court strongly implied -- contrary to Florida law -- that Rogers could not reassert his right to counsel. When Rogers asked for assistance in obtaining documents held by another court, the trial court essentially told Rogers that he had made his decision and was stuck with it:

> You're representing yourself and you made that decision to represent yourself, and then you say, "Well, golly, gee, I have so much difficulty getting all this done." Well, so what. You take your choice, I guess.... I mean, Mr. Rogers has undertaken to represent himself. And he goes by the same rules.

Far from renewing the offer of counsel, the trial court's comments were stark: "You're representing yourself and you made that decision . . . . Well, so what. You take your choice, I guess."

In sum, the trial court failed to comply with an explicit requirement of Florida criminal procedure governing any case where a defendant proceeds *pro se*. The court never renewed the offer of counsel at any stage of the proceedings, despite an intervening mistrial, a

critical evidentiary ruling, and the passage of many months before the second trial. This error was obvious and self-evident from even a cursory review of the record.

Under settled precedent, the court of appeals was bound to analyze appellate counsel's performance under the case law in effect at the time of Rogers's direct appeal. That case law universally recognized that the failure to renew the offer of counsel was *per se* reversible error under Florida law. Counsel's failure to raise this obvious claim of reversible error fell below minimally competent standards of representation. And the failure of the court of appeals to analyze counsel's performance under the standards in effect at the time of the direct appeal was flatly contrary to this Court's precedent and a manifest error of law.

CONCLUSION

The court of appeals disregarded this Court's explicit precedent in failing to apply the law in effect at the time of Rogers's appeal to assess the performance of Rogers' counsel on direct appeal. Appellate counsel's failure to raise a claim of reversible error under then-prevailing law denied Rogers his right to the effective assistance of appellate counsel. The contrary conclusion of the court of appeals is manifest legal error under this Court's precedent.

The petition should be granted.

Respectfully submitted,

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February 23, 2001

APPENDIX

United States Court of Appeals
For the Eleventh Circuit

No. 99-10065

District Court Docket No. 97-01043-CIV

JERRY LAYNE ROGERS,

Petitioner-Appellant,

versus

MICHAEL W. MOORE,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

Before ANDERSON, Chief Judge, DUBINA and HILL, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be and the same is hereby AFFIRMED.

Entered: October 12, 2000
For the Court: Thomas K. Kahn, Clerk
By: /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: DEC 06 2000

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 99-10065-EE

FILED NOV 27, 2000

JERRY LAYNE ROGERS,

Petitioner-Appellant,

versus

MICHAEL W. MOORE,

Respondent-Appellee.

On Appeal from the United States District Court for the Middle District of Florida

---

Before ANDERSON, Chief Judge, DUBINA and HILL, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Jerry Lane Rogers is DENIED.

ENTERED FOR THE COURT:

/s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

ORD-41

[DO NOT PUBLISH]

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 99-10065

FILED OCT. 12, 2000

District Court Docket No.
97-01043-CIV-ORL-22

JERRY LAYNE ROGERS,

Petitioner-Appellant,

versus

MICHAEL W. MOORE,

Respondent-Appellee.

Appeal from the United States District Court for the Middle District of Florida

---

(October 12, 2000)

Before ANDERSON, Chief Judge, DUBINA and HILL, Circuit Judges.

PER CURIAM:

Petitioner Jerry Layne Rogers ("Rogers") appeals the district court's order denying him habeas corpus relief pursuant to 28 U.S.C. § 2254. This court issued a certificate of appealability ("COA") on two issues: (1) whether Rogers received ineffective assistance of counsel because his lawyer failed to raise on direct appeal a claim of reversible error based on the trial court's failure to warn Rogers of the dangers and disadvantages of representing himself at trial; and (2) whether Rogers received ineffective assistance of counsel because his lawyer failed to raise on direct appeal a claim of reversible error based on the trial court's failure to renew the offer of counsel to Rogers as required by Fla.R.Crim.P. 3.111(d). After reviewing the record, we affirm the judgment of the district court denying habeas relief.

I. BACKGROUND

The authorities arrested Rogers and charged him with two counts of armed robbery in connection with the robbery of a Publix store in Orange County, Florida. During pretrial proceedings, the state trial court declared Rogers indigent and appointed Charles Tabscott ("Tabscott") to represent him. The day before the trial, Rogers informed the trial court that he wished to represent himself The trial court conducted a colloquy with Rogers, Tabscott, and the State Attorney. Following the colloquy, the trial court granted Tabscott's motion to withdraw and allowed Rogers to proceed *pro se*, with Tabscott remaining in an advisory capacity. Three days

into the trial, the trial court granted a mistrial because a state witness repeatedly commented on other crimes allegedly involving Rogers. Prior to the second trial, the trial court reversed its ruling on the admission of the other crimes evidence, Consequently, Rogers requested a one-month continuance, which the trial court granted. Rogers continued to represent himself at his second trial and his sentencing hearing.

The trial court appointed counsel to represent Rogers on direct appeal. Counsel filed a brief, raising seven claims, but failed to raise any claim under *Faretta v. California*, 422 U.S. 806 (1975), or Fla.R.Crim.P. 3.111. The Florida Fifth District Court of Appeal affirmed Rogers's convictions and sentences without written opinion. On November 6, 1995, Rogers filed an original petition for writ of habeas corpus in Florida state court. Rogers argued that he was denied the right to effective assistance of appellate counsel because his counsel failed to raise any challenge to the constitutionality and legality of his waiver of trial counsel. The state appellate court denied Rogers's petition without written opinion. Rogers then filed a federal habeas corpus petition on August 24, 1997. Without conducting an evidentiary hearing, the district court denied the petition. Rogers filed a timely notice of appeal. The district court denied him a COA, but this court issued Rogers a certificate on the two issues previously mentioned.

II. STANDARD OF REVIEW

The Anti-Effective Death Penalty Act ("AEDPA") which became effective on April 24, 1996, governs this court's review of Rogers's federal habeas petition because he filed his petition after the Act's effective date. *See* 28 U.S.C. § 2241 *et seq.*; *Wilcox v. Florida Dep't of Corrections*,

158 F.3d 1209, 12 10 (11th Cir. 1998), *petition for cert. filed*, _ U.S.L.W. (U.S., May 23, 2000) (No. 99-9681). The AEDPA amended portions of the habeas statute and added a provision which determines a federal court's review over habeas corpus petitions. Title 28 U.S.C. § 2254(d)(1) & (2) provide:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

When considering the "clearly established law" requirement, the Supreme Court has stated that "[t]he

antiretroactivity rule recognized in *Teague [v. Lane*, 489 U.S. 288 (1989)], which prohibits reliance on 'new rules,' is the functional equivalent of a statutory provision commanding exclusive reliance on 'clearly established law."' *Williams v. Taylor*, __ U.S. __, 120 S.Ct. 1495, 1506 (2000). The Court further held that "[i]t is perfectly clear that AEDPA codifies Teague to the extent that Teague requires federal habeas courts to deny relief that is contingent upon a rule of law not clearly established at the time the state conviction became final." *Id.* The determination whether or not a rule is clearly established at the time a state court renders its final judgment of conviction is a question the federal courts must independently evaluate. *See id.* at 1507.

In discussing the "contrary to, or an unreasonable application of' requirement, the Court noted that the message Congress intended to convey by the use of this phrase "is not entirely clear." *Id.* at 1508. The Court noted, however, that "the text [of the statute] is fairly read simply as a command that a federal court not issue the habeas writ unless the state court was wrong as a matter of law or unreasonable in its application of law in a given case." *Id.* at 1509. The Court reasoned that "it seems clear that Congress intended federal judges to attend with the utmost care to state-court decisions, including all of the reasons supporting their decisions, before concluding that those proceedings were infected by constitutional error sufficiently serious to warrant the issuance of the writ." *Id.* Accordingly, "federal habeas courts must make as the starting point of their analysis the state courts' determinations of fact." *Id.* However, after carefully considering all the reasons for accepting the state court's judgment, the federal court, if still convinced that the prisoner's conviction violates the

Constitution, should not accept the state court's judgment. *See id.* at 1511.

III. DISCUSSION

The State argues that Rogers's claims of ineffective assistance of appellate counsel are procedurally barred in federal court because state procedural rules provide that his state habeas petition was untimely. The State raised this argument in a motion to dismiss, which the state appellate court denied. Therefore, we must assume that the state appellate court considered the petition on the merits since it did not clearly and expressly rely on an independent and adequate state procedural ground to dismiss the petition. *See Coleman v. Thompson*, 501 U.S. 722, 735 (1991).

Rogers's claims of ineffective assistance of appellate counsel are governed by the standard enunciated by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984).[1] Because the state appellate court did not issue a written opinion denying Rogers's state habeas petition alleging claims of ineffective assistance of counsel, this court must consider, in its independent judgment, whether Rogers's claims rise to the level of a constitutional violation. *See Williams*, 120 S.Ct. at 1509-11.

A. The *Faretta* claim

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[1] To prove a claim of ineffective assistance of appellate counsel, Rogers must show that counsel's performance was deficient and that, but for that deficient performance, the result of his appeal would have been different. *See Strickland*, 466 U.S. at 687-88.

Rogers argues that his appellate counsel was ineffective for failing to raise a *Faretta* claim on direct appeal. Specifically, Rogers contends that the trial court did not conduct an adequate inquiry into his desire for self-representation, and since this establishes a constitutional violation, his appellate counsel was ineffective for failing to raise the argument on appeal. In *Faretta*, the Supreme Court held that an accused has a Sixth Amendment right to represent himself. *See* 422 U.S. at 819. Before a court permits a defendant to proceed *pro se* at trial, the defendant must clearly and unequivocally assert the right of self-representation. *See Fitzpatrick v. Wainwright*, 800 F.2d 1057, 1064 (11th Cir. 1986). The record in this case indicates that on numerous occasions, Rogers asserted to the trial court his wish to proceed *pro se*. Moreover, the record does not demonstrate that Rogers equivocated in his desire to represent himself.

Faretta also holds that a trial court should conduct a waiver hearing to ensure that the defendant understands the disadvantages of self-representation. *See Faretta*, 422 U.S. at 835; *Fitzpatrick*, 800 F.2d at 1065. The trial court did conduct a colloquy during which it discussed with Rogers his wish to represent himself. During the colloquy, the trial court noted that Rogers had participated in prior criminal proceedings, was educated, and intelligent. The trial court also noted that Tabscott would be available to assist Rogers during the trial. Tabscott told the court that if anyone was capable of representing himself, it was Rogers. Based on this, the trial court permitted Rogers to proceed *pro se*. Rogers claims that this "colloquy" was inadequate under *Faretta* because the trial court did not adequately inform Rogers of the risks and disadvantages of self-representation.

A review of the record discloses that the trial court did not delve into Rogers's understanding of the risks

and dangers inherent in self-representation; however, the law does not require such a rigid inquiry. "[T]he case law indicates that, while a waiver hearing expressly addressing the disadvantages of a *pro se* defense is much to be preferred, it is not absolutely necessary." *Fitzpatrick*, 800 F.2d at 1065. "The ultimate test is not the trial court's express advice, but rather the defendant's understanding." *Id.* As long as the record indicates that Rogers's decision to represent himself was made with an understanding of the risks of self-representation, then the knowing, intelligent, and voluntary waiver standard of the Sixth Amendment is satisfied. *See id.* In short, so long as the record establishes that Rogers "knew what he was doing and his choice was made with eyes open," then this court will uphold the trial court's decision. *See id.* (quoting *Faretta*, 422 U.S. at 835).

The record shows that the *Faretta* standard was met in this case. Rogers never wavered from his decision to represent himself Tabscott assisted Rogers on a few occasions, but Rogers never indicated that he needed more assistance from Tabscott. Rogers was articulate during the trial, stating objections, conducting *voir dire*, and examining witnesses as well as a lawyer would. As the trial court noted, Rogers was educated and intelligent. Moreover, Rogers had prior criminal trial experience and knew that his sentence could range from zero to life in prison. All of these factors demonstrate that Rogers knew of the dangers inherent in self-representation and that he made his decision with "eyes open." Accordingly, we see no *Faretta* violation, and therefore, no Sixth Amendment violation for appellate counsel's failure to raise this allegedly "winning" argument on appeal.[2]

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[2] We find a companion case of Rogers's elucidating in this situation. *See Rogers v. Singletary*, 698 So.2d 1178 (Fla. 1996)

B. The Rule 3.111(d) claim

Rogers also argues that his appellate counsel was ineffective for failing to argue on appeal that the trial court's failure to abide by Fla.R.Crim.P. 3.111(d), which requires a trial court to advise a *pro se* defendant at each subsequent stage of the proceedings that he can invoke his right to counsel, violated his constitutional rights. He claims that under Florida law, the trial court's failure to do this is reversible error. Thus, his appellate counsel was ineffective for failing to raise this argument on appeal.

Rogers cannot prevail on this claim because there is no *per se* rule in Florida that a trial court's failure to inform a defendant of his right to counsel at each subsequent stage of the proceeding as required by Fla.R.Crim.P. 3.111(d) constitutes reversible error. *See State v. Roberts*, 677 So.2d 264, 265 (Fla. 1996) (upholding a conviction even though the trial court failed to advise a *pro se* defendant of the right to counsel at each subsequent stage of trial); *Mincey v. State*, 684 So.2d 236, 238 (Fla. Dist. Ct. App. 1996) (holding that a trial court's failure to renew offer to appoint counsel at each stage of proceeding subsequent to that at which defendant represented himself with assistance of stand-by counsel, was harmless error); *Crystal v. State*, 616 So.2d 150, 152 (Fla. Dist. Ct. App. 1993) (trial court's decision on defendant's request to represent himself is reviewed for abuse of discretion); *see also Harrell v. State*, 486 So.2d 7, 7-8 (Fla. Dist. Ct. App. 1986) ("The continuous presence of

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(holding that a formal *Faretta* hearing is not necessary to determine a defendant's understanding of his waiver of counsel).

stand-by counsel served as a constant reminder to [defendant] of his right to counsel.").

Instead, the Florida courts focus on the defendant's understanding of the waiver of counsel and his competency to waive counsel. *See State v. Bowen*, 698 So.2d 248, 251 (Fla. 1997) (noting that the focus in conducting a waiver-of-counsel hearing under Rule 3.111 should be on the defendant's competence to waive counsel, not on his competence to represent himself). Particularly, Florida law requires the trial court to inquire into a defendant's education and prior criminal experience. *See Johnston v. State*, 497 So.2d 863, 868 (Fla. 1986) (when making waiver determination, trial court should inquire into a defendant's age, mental status, and lack of knowledge and experience in criminal proceedings). The trial court did that in this case. Accordingly, pursuant to Florida law, the trial court conducted a sufficient inquiry under Rule 3.111. Therefore, Rogers's appellate counsel was not ineffective for failing to raise this argument on appeal.

IV. CONCLUSION

Based on the foregoing analysis, we affirm the judgment of the district court. AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 99-10065-E FILED DEC. 13, 2000

JERRY LAYNE ROGERS,

Petitioner-Appellant,

versus

MICHAEL W. MOORE,

Respondent-Appellee.

Appeal from the United States District Court for the Middle District of Florida

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ORDER:

Appellant's "motion for correction of order granting certificate of appealability" is GRANTED.

Accordingly, appellant's motion for certificate of appealability is GRANTED on the following issue(s) only:

Whether appellate counsel was constitutionally ineffective for failing to argue on direct appeal that the trial court did not adequately warn appellant of the dangers and disadvantages of representing himself at trial.

Whether appellate counsel was constitutionally ineffective for failing to argue on direct appeal that the trial court did not renew an offer of counsel to appellant at any time after appellant waived his right to counsel.

No certificate of appealability should issue on any other claims because he failed to make a substantial showing of the denial of a constitutional right, see 28 U.S.C. § 2253(c)(2).

/s/ ED CARNES
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 99-10065-E FILED DEC 01, 1999

JERRY LAYNE ROGERS,

Petitioner-Appellant,

versus

MICHAEL W. MOORE,

Respondent-Appellee.

Appeal from the United States District Court for the Middle District of Florida

---

ORDER:

Appellant's "motion for certificate of appealability is GRANTED on the following issue(s) only:

Whether appellate counsel was constitutionally

ineffective for failing to argue on direct appeal that the trial court did not adequately warn appellant of the dangers and disadvantages of representing himself on appeal.

Whether appellate counsel was constitutionally ineffective for failing to argue on direct appeal that the trial court did not renew an offer of counsel to appellant at any time after appellant waived his right to counsel.

No certificate of appealability should issue on any other claims because he failed to make a substantial showing of the denial of a constitutional right, see 28 U.S.C. § 2253(c)(2).

/s/ Ed Carnes
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JERRY LAYNE ROGERS,

Petitioner

v. CASE NO. 97-1043-CIV-ORL-22

HARRY K. SINGLETARY, et al.,

Respondents.

ORDER

This case is before the Court on the following motion:

MOTION: Petitioner's Motion for Reconsideration (Doc. No. 31, filed April 8, 1999).

Thereon it is **ORDERED** that the motion is **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Florida this 12th day of April, 1999.

/s/ Anne C. Conway
ANNE C. CONWAY
UNITED STATES DISTRICT JUDGE

Copies to:
pslc 4/12
Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JERRY LAYNE ROGERS,

Petitioner

v. CASE NO. 97-1043-CIV-ORL-22

HARRY K. SINGLETARY, et al.,

Respondents.

ORDER

This case is before the Court on the following motion:

Petitioner's Request for A Certificate of Appealability (Doc. No. 29, filed March 22, 1999) is **DENIED**. Petitioner has not made a substantial showing of the deprivation of any federal constitutional right.

DONE AND ORDERED in Chambers at Orlando, Florida this 29th day of March, 1999.

/s/ Anne C. Conway
ANNE C. CONWAY
UNITED STATES DISTRICT JUDGE

Copies to:
pslc 3/23
Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JERRY LAYNE ROGERS,

Petitioner

v. Case No. 97-1043-Civ-Orl-22B

HARRY K. SINGLETARY, et al.,

Respondents.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED the petition for Writ of Habeas Corpus filed by Jerry Layne Rogers is DENIED, and this case is DISMISSED WITH PREJUDICE. Wherefore, the Petitioner shall take nothing, and the action be dismissed on the merits.

Date: February 23, 1999

RICHARD D. SLETTEN,
CLERK

By: /s/ H. Lang
H. Lang, Deputy Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JERRY LAYNE ROGERS,

Petitioner

v.

HARRY K. SINGLETARY, et al.,

Respondents.

FILED 99 FEB 22

Case No. 97-1043-Civ-Orl-22B

ORDER

Petitioner initiated this action for habeas corpus relief pursuant to 28 U.S.C.§ 2254. Upon consideration of the petition, the Court ordered Respondents to show cause why the relief sought in the petition should not be granted. Thereafter, Respondents filed a timely reply to the petition for writ of habeas corpus in compliance with this Court's instructions and with the *Rules Governing Section 2254 Cases in the United States District Courts* (Doc. No. 20, filed December 22, 1997). Petitioner alleges three claims for relief in his habeas petition: first, that the trial court failed to adequately warn Petitioner of the dangers and disadvantages of self-representation; second, that he received ineffective assistance of counsel; and third, that he received ineffective assistance of appellate counsel.

V. Procedural History

Petitioner was charged by information with two counts of armed robbery.[3] A jury trial was held, which resulted in a mistrial. A second jury trial was later held, and Petitioner was found guilty as charged in the information. The trial court adjudicated Petitioner guilty of two counts of armed robbery and sentenced him to imprisonment for a term of twenty years as to each count, with the sentences to run concurrently.

Petitioner Filed a direct appeal with the Florida Fifth District Court of Appeal, which affirmed *per curiam*. Almost eleven years later, Petitioner filed a petition for writ of habeas corpus with the Fifth District, which was denied.

VI. Claims One and Two

Claims one and two were not raised with the state courts. The federal court must dismiss those claims or portions of claims that either (1) have been explicitly ruled procedurally barred by the highest state court considering the claims,[4] or (2) are not exhausted but would clearly be barred if returned to state court.[5] Thus,

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[3] According to Petitioner, "[b]ecause money was taken from two people during a single incident at the Publix store, (Petitioner] was charged with two separate armed robberies . . . ."

[4] *Harris v. Reed*, 489 U.S. 255 (1989).

[5] *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991) (if the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred, there is a procedural default for federal habeas purposes regardless of

"[f]ederal courts are precluded from addressing claims that have been held to be procedurally defaulted under state law. In addition, federal courts may not address claims that have not been presented in state court if the state court would have found the claims to be procedurally defaulted . . . ." *Tower v. Phillips*, 7 F.3d 206, 210 (11th Cir. 1993).[6]

Claims one and two are procedurally barred in this Court because they were not raised with the state courts. There are two exceptions to the procedural default bar. The first is the "cause and prejudice" exception;[7] the second, which is a narrow one, is the "actually innocent" exception, also known as the "fundamental miscarriage of justice" exception, used in extraordinary circumstances. *See Johnson v. Singletary*, 938 F.2d 1166, 1174-75 (11th Cir. 1991), *cert. denied*, 506 U.S. 930 (1992). In the present case, Petitioner has not shown either cause or prejudice that would excuse the default.

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the decision of the last state court to which the petitioner actually presented his claims); *Bassette v. Thompson*, 915 F.2d 932, 937 (4th Cir. 1990), cat. denied, 499 U.S. 982 (1991) ("[w]hen a claim is never presented to the state court *Teague* does not require that the last state court rendering judgment 'clearly and expressly' state that its judgment rests on a procedural bar.").

[6] Also, if the petitioner attempts to raise the claim in a manner not permitted by state procedural rules, he is barred from pursuing the same claim in federal court. *Alderman v. Zant*, 22 F.3d 1541, 1549 (11th Cir. 1994), *cert. denied*, 513 U.S. 1061 (1995).

[7] *See Engle v. Isaac*, 456 U.S. 107, 129 (1982) ("when a procedural default bars state litigation of a court claim, a state prisoner may not obtain federal habeas relief absent a showing of cause and actual prejudice.").

Likewise, Petitioner has neither alleged nor shown the applicability of the actually innocent exception. The entire record has been reviewed, and the Court concludes that Petitioner is unable to satisfy either of the exceptions to the procedural default bar. Therefore, claims one and two must be denied.

VII. Claim Three

Petitioner contends that he received ineffective assistance of appellate counsel because appellate counsel failed to argue that the trial court erred when it failed to advise him at the second trial of his right to be represented by counsel.

The record reflects that Petitioner's appellate counsel raised ***seven*** issues on direct appeal. Petitioner's appellate counsel submitted an initial brief which was comprehensive, thorough, and well-argued. Certainly, the record clearly evinces the thoroughness and reasonableness of appellate counsel's work. *Cf. Thomas v. Scully*, 854 F. Supp. 944 (E.D.N.Y. 1994) (the appellate brief submitted by counsel clearly showed the thoroughness of counsel's work). The fact that this other issue might have succeeded in the state appellate court "does not lead automatically to the conclusion that (Petitioner) was deprived of a constitutional right when his lawyer failed to assert such a claim." *Woodfork v. Russell*, No. 92-4301, 1994 WL 56933 (6th Cir. February 24, 1994) (unpublished opinion). As discussed by the district court in *Richburg v. Hood*, 794 F. Supp. 75 (E.D.N.Y. 1992),

> [T]he court simply notes that the decision of appellate counsel to choose among plausible options of appellate

> issues is preeminently a strategic choice and is "virtually unchallengeable." The petitioner has not even undertaken to demonstrate that the decision of his attorney not to raise this issue constituted an "unprofessional error" or that such error prejudiced his appeal.

Id. at 78. In this case, the Court finds that appellate counsel's decision not to pursue the other issue was consistent with reasonable appellate strategy that, under the deferential standard of review articulated in *Strickland*, should not be second-guessed. *See Gray v. White*, No. C-94-2434 EFL, 1997 WL 16311, at *9 (N.D. Cal. January 6, 1997) (citations omitted) ("appellate counsel does not have a constitutional duty to raise every nonfrivolous issue requested by defendant. The weeding out of weaker issues is widely recognized as one of the hallmarks of effective appellate advocacy."); *Carlos v. Cruz*, No. CV 96-5209 (RED), 1997 WL 269591, at *4 (E.D.N.Y. April 21, 1997), *affirmed*, No. 97-2302, 1997 WL 829269 (2d Cir. December 8, 1997) (unpublished opinion) ("On appeal, counsel is not required to argue every non-frivolous issue; rather, the better strategy may be to focus on a few more promising issues so as not to dilute the stronger arguments with a multitude of claims"; moreover, the Court must not second-guess the reasonable decisions of appellate counsel to press certain issues instead of others, and the lack of success on appeal is not a basis to impugn appellate counsel's reasonable choices or performance).

Further, Petitioner has failed to demonstrate that this other issue would have been successful on direct appeal. Petitioner had waived his right to counsel during the first trial. There was overwhelming evidence of Petitioner's guilt. Petitioner was identified as one of the armed robbers by his accomplice, Thomas McDermid, and by eyewitnesses to the crimes. Therefore, it was appropriate for appellate counsel to have omitted this other issue on direct appeal. Accordingly, in light of 1) the discretion afforded to appellate counsel in selecting those issues most promising for review, and 2) Petitioner's failure to demonstrate that this other issue would have been viable on appeal, the Court finds that appellate counsel's performance was not deficient and that Petitioner has not demonstrated prejudice. Hence, claim three must fail.

Any of Petitioner's allegations not specifically addressed herein have been found to be without merit.

Accordingly, it is hereby **ORDERED AND ADJUDGED** as follows:

1. The Petition for Writ of Habeas Corpus filed by Jerry Layne Rogers is **DENIED**, and this case is **DISMISSED WITH PREJUDICE**. The Clerk of the Court shall enter judgment accordingly.

2. The Clerk of the Court is directed to close this case.

DONE AND ORDERED in Chambers at Orlando, Florida, this 19th of February, 1999.

/s/ Anne C. Conway
ANNE C. CONWAY
UNITED STATES DISTRICT JUDGE

Copies to:
pslc 2/19
Counsel of Record
Jerry Layne Rogers

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

JERRY LAYNE ROGERS,

Petitioner

v. Case No. 95-2872

STATE OF FLORIDA, et al.,

Respondent.

DATE: August 28, 1996

BY ORDER OF THE COURT:

ORDERED that the PETITION FOR WRIT OF HABEAS CORPUS, filed November 7, 1995, is denied. Upon consideration thereof, it is

ORDERED that Petitioner's MOTION FOR LEAVE TO EXCEED PAGE LIMITS, filed July 16, 1996, is moot.

I hereby certify that the foregoing is
(a true copy of) the original court order.

FRANK J. HABERSHAW, CLERK

BY: /s/ Linda A. Howard
Deputy Clerk

(COURT SEAL)

cc: John G. Buchanan, III, Esq. and Timothy Hester, Esq. and Benedict Lenhart, Esq. and Michael S. Long, Esq.
Jerrel Phillips, Esq.
Office of the Attorney General, Daytona Beach
Harry K. Singletary
Office of the State Attorney, Daytona Beach

IN THE CIRCUIT COURT,
NINTH JUDICIAL
CIRCUIT, IN AND FOR
ORANGE COUNTY,
FLORIDA

CASE NO. CR 82-1939
FIFTH DCA NO. 95-2872

STATE OF FLORIDA,

Plaintiff,

vs.

JERRY LAYNE ROGERS,

Defendant

ORDER ON RECONSTRUCTION OF RECORD

On March 29, 1996, an order was entered by the Fifth District Court of Appeal of the State of Florida, remanding this cause to this court to reconstruct a record of proceedings conducting in this cause prior to the trial herein which commenced on October 31, 1983.

The proceedings which are alleged to have occurred for which there are no stenographic notes or other records available from which transcripts can be produced are hearings conducted on January 31, 1983, and March 25, 1983.

On May 16, 1996, a hearing was conducted at the orange County Courthouse. At that hearing both the State and the Defendant presented witnesses in an effort to reconstruct what transpired at those hearings.

The primary witness for the State, Assistant State Attorney Joe Cocchiarella, testified to what he recalled was the substance of the hearings, saying, if effect, that the Defendant came to each hearing seeking to represent himself, but that the Court pointed out the dangers of representing one's self and that the Defendant was talked out of it.

Witnesses called for the defense also failed to recall any specific testimony or evidence presented at these hearings.

Subsequent to the May 16 hearing each side has filed proposed orders and notions addressed to the other side's perception of what occurred at the hearing. Those motions and proposed orders were not enlightening and served no useful purpose in reconstructing the record in this cause.

The May 16 testimony did not refresh the recollection of this judge about what happened at these hearings. The record pleadings and orders reflect that, in any event, the Defendant did not begin to represent himself until after a hearing conducted on August 22, 1983, when Charles Tapscott, an attorney appointed to represent the Defendant, was permitted to withdraw. The transcript of that hearing is available as part of the record in this cause.

Therefore, this Court finds that it cannot reconstruct the record of these proceedings other than as set forth in this order.

ORDERED AND ADJUDGED at Kissimmee, Osceola County, Florida, this 30th day of May, 1996.

/s/ Ted Coleman
Ted Coleman, Circuit Judge

I CERTIFY that a copies of the foregoing were furnished by mail to Timothy C. Hester, Esq., COVINGTON & BURLING, 1201 Pennsylvania Ave., N.W., Washington, D.C. 20044, Jerrel Phillips, Esq., P. 0. Box 14463, Tallahassee, FL 32339-2400 Paula C. Coffman, Esq., Ast. State Attorney, P. 0. Box 1673, Orlando, FL 32802, and to Mark S. Dunn, Esq., Asst. Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, on the date of entry.

/s/ Dorothy Richardson
Judicial Assistant

IN THE UNITED STATES DISTRICT COURT OF
APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

JERRY LAYNE ROGERS,

Petitioner

v. Case No. 95-2872

STATE OF FLORIDA, et al.,

Respondent.

DATE: March 29, 1996

BY ORDER OF THE COURT:

ORDERED that Respondent's MOTION TO RELINQUISH JURISDICTION TO RECONSTRUCT RECORD AND TO TOLL TIME FOR FILING RESPONSE, filed February 26, 1996, is granted. Accordingly, jurisdiction is relinquished to the Circuit Court for Orange County, Florida, to and including May 31, 1996, for the purpose requested. Respondent is granted to and including June 21, 1996, to comply with the November 30, 1995, Order of this Court.

I hereby certify that the foregoing is
(a true copy of) the original court order.

/s/ Frank J. Habershaw

FRANK J. HABERSHAW, CLERK

BY: _____
Deputy Clerk

(COURT SEAL)

cc: Clerk of the Court, Orange County (CR82-1939)
Timothy Hester, Esq.
Office of the Attorney General, Daytona Beach
Jerrel E. Phillips, Esq.
Harry K. Singletary
Michael Long, Esq.

IN THE UNITED STATES DISTRICT COURT OF
APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

JERRY LAYNE ROGERS,

Petitioner

v. Case No. 95-2872

STATE OF FLORIDA, et al.,

Respondent.

DATE: February 2, 1996

BY ORDER OF THE COURT:

ORDERED that Respondent's MOTION TO DISMISS OR COMPEL, filed December 21, 1995, is denied. Respondent's ALTERNATIVE REQUEST TO SUPPLEMENT THE RECORD is granted. Respondent is granted to and including March 4, 1996, to file its Response in this cause.

I hereby certify that the foregoing is
(a true copy of) the original court order.

/s/ Frank J. Habershaw

FRANK J. HABERSHAW, CLERK

BY: _____

Deputy Clerk

(COURT SEAL)

cc: Timothy Hester, Esq.
Office of the Attorney General, Daytona Beach
Office of the State Attorney, Daytona Beach
Jerrel E. Phillips, Esq.
Harry K. Singletary
Michael Long, Esq.